No. 84-127

JAN 17 1985

ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS

JACOB A. STEIN
ROBERT F. MUSE
STEIN, MITCHELL & MEZINES
1800 M St., N.W.
Washington, D.C. 20036
(202) 737-7777

ROBERT M. WEINBERG *
MICHAEL H. GOTTESMAN
PETER O. SHINEVAR
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF THE CASE	1
A. The Facts	1
1. The Incident Concerning Allis	1
2. The Incident Concerning Butler	14
B. The Opinion of the District Court	19
C. The Opinion of the Court of Appeals	21
SUMMARY OF ARGUMENT	26
ARGUMENT	27
I. THE DISQUALIFICATION ORDER WAS IMMEDIATELY APPEALABLE	27
II. THE REVERSAL OF THE DISQUALIFICATION ORDER WAS PROPER	38
A. The Ruling Respecting Allis' Disqualification	40
B. The Ruling Respecting Butler's Disqualification	41
CONCLUSION	50
APPENDIX	1a
District of Columbia Code of Professional Responsibility	
DR 7-101	1a
DR 7-102(B)	2a

TABLE OF AUTHORITIES

CASES

	Page
Abney v. United States, 431 U.S. 651 (1977)	29
Aetna Casualty & Surety Co. v. United States, 570 F.2d 1197 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978)	32
Ah Ju Steel Co. v. Armco, Inc., 680 F.2d 751 (C.C.P.A. 1982)	32
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	39
American Protection Insurance Co. v. MGM Grand Hotel, 748 F.2d 1293 (9th Cir. 1984)	32, 45
Armstrong v. McAlpin, 625 F.2d 433 (2nd Cir. 1980) (*en banc*), *vacated on other grounds*, 449 U.S. 1106 (1981)	30, 32, 35, 44
Board of Education of New York City v. Nyquist, 590 F.2d 1241 (2d Cir. 1979)	22, 44, 45
Bose Corp. v. Consumers Union, —— U.S. ——, 104 S. Ct. 1949 (1984)	48
CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975)	48
Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268 (2d Cir. 1975)	34
Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1974), *cert. denied*, 427 U.S. 912 (1976)	47
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	22, 27-28
Duncan v. Merrill Lynch, 646 F.2d 1020 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981)	30, 31, 32
Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981)	29, 31
Flanagan v. United States, —— U.S. ——, 104 S.Ct. 1051 (1984)	22, 27-28
Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982)	30, 31, 32
General Mill Supply Co. v. SCA Services, Inc., 698 F.2d 704 (6th Cir. 1982)	32
Gibbs v. Paluk, 742 F.2d 181 (5th Cir. 1984)	29-30, 32
Gough v. Perkowski, 694 F.2d 1140 (9th Cir. 1982)	30, 31, 32
Groper v. Taff, 717 F.2d 1415 (D.C. Cir. 1983)	32
Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981)	39

TABLE OF AUTHORITIES—Continued

	Page
Hirshkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (*en banc*)	48
In re Multi-Piece Rim Prod. Liab. Litig., 612 F.2d 377 (8th Cir. 1980), *vacated on other grounds sub nom. Firstone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981)	32
Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)	40
Interco Systems, Inc. v. Omni Corpate Services, 733 F.2d 253 (2d Cir. 1984)	32
International Business Machines v. Levin, 579 F.2d 271 (3rd Cir. 1978)	32
J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357 (2d Cir. 1975)	34
Kahle v. Oppenheimer & Co., 748 F.2d 337 (6th Cir. 1984)	29, 32
Lefrak v. Arabian American Oil Co., 527 F.2d 1136 (2d Cir. 1975)	34
Melamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979)	34
NAACP v. Button, 371 U.S. 415 (1963)	49
National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976)	40
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)	48
Norton v. Tallahassee Memorial Hospital, 689 F.2d 938 (11th Cir. 1982)	32
Panduit Corp. v. All States Plastics Manufacturing, 744 F.2d 1564 (Fed. Cir. 1984)	32
Pennekamp v. Florida, 328 U.S. 331 (1946)	48
People v. Ayers, 51 Cal. App. 3d 370, 124 Cal. Rptr. 283 (1975)	25
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	39-40
Redd v. Shell Oil Co., 518 F.2d 311 (10th Cir. 1975)	34
Ruggieri v. Johns-Manville Products Corp., 503 F. Supp. 1036 (D.R.I. 1980)	48
Sacher v. United States, 343 U.S. 1 (1952)	45
Sheppard v. Maxwell, 384 U.S. 333 (1966)	48
State v. Kavanaugh, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968)	43

TABLE OF AUTHORITIES—Continued

	Page
Taylor v. Hayes, 418 U.S. 488 (1974)	45
United States v. Wilson, 421 U.S. 309 (1975)	45
W.T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir. 1976)	34, 44
Wood v. Georgia, 370 U.S. 375 (1962)	48, 49
Woods v. Covinton County Bank, 537 F.2d 804 (5th Cir. 1976)	34
STATUTES AND RULES	
Federal Rules of Civil Procedure 52(a)	39-40
28 U.S.C. § 1291	27-38
California Penal Code § 632(a)	25
California Penal Code § 632(c)	25
California Penal Code § 633.5	25
District of Columbia Code of Professional Responsibility	*passim*
DR 2-106(C)	31
DR 7-107(H) (Canon 20)	25, 43, 45-46
MISCELLANEOUS	
Bayer & Abrahams, *The Ethics of Moving for Disqualification of Opposing Counsel*, 13 Colorado Lawyer, Jan. 1984, at 55	34
Crocker, *The Ethics of Moving to Disqualify Opposing Counsel for Conflict of Interest*, 1979 Duke L.J. 1310	33
Hilliker, *Attorney Disqualification Motions*, 26 The Practical Lawyer, Oct. 15, 1980, at 11	34
Van Graafeiland, *Lawyer's Conflict of Interest—A Judge's View (Part II)*, N.Y.L.J., July 20, 1977, at 1	34
Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. Chi. L. Rev. 450 (1978)	33-34, 35
D.C. Bar Legal Ethics Committee, Formal Opinion 37 (1977)	31

BRIEF FOR RESPONDENTS

COUNTER-STATEMENT OF THE CASE*

A. The Facts

This is a suit by an infant child and her parents, the Kollers, against petitioner, Richardson-Merrell Inc., alleging that the child was born without arms and legs because of Mrs. Koller's ingestion during pregnancy of petioner's product, the drug Bendectin. In February 1983, nearly three years after the suit was brought, and shortly before trial was to begin, petitioner moved to disqualify the Kollers' primary counsel, Messrs. Allis and Butler, alleging two discrete acts of misconduct. The trial was postponed indefinitely, and for the next eleven months the case changed from an inquiry into petitioner's alleged wrong to a massive inquiry into the conduct of Allis and Butler. From the record thus amassed the material facts emerged essentially undisputed.[1] Petitioner's statement distorts that record, and thus we are compelled to set forth the facts in a comprehensive manner.

1. *The Incident Concerning Allis*

a. *The sequence of events.* A key element of the Kollers' claim was that Mrs. Koller had ingested Bendectin early in her pregnancy. Well before the events that are the subject of the district court's opinion, Allis had satisfied himself that this aspect of the claim was well-founded. Mrs. Koller had testified in two separate depositions that she had ingested Bendectin during the critical period (C.A. App. [Joint Appendix in Court of Appeals] at 1140-44, 1151-58, 1173-77). That testi-

---

* The Appendix to the Petition in this case does not set forth the relevant language of District of Columbia Code of Professional Responsibility DR 7-101 and misstates the language of DR 7-102(B). Those Rules are set forth in the appendix to this brief.

[1] See Pet. App. 5a, n.6, 14a, n.27. As discussed *infra* at n.5, 18-19, 20-21 & n.19, there are at most two issues of disputed fact involved here. Neither issue was material to the decision of the court of appeals, and in neither instance did that court overturn the district court's finding of fact.

mony was corroborated by physicians' medical records made during her pregnancy (JA 147, 149; C.A. App. 1391-93), and by the testimony of her husband (J. Koller Dep. 1-22-82 pp. 89-91). In addition, Allis knew Mrs. Koller to be a person of the highest personal integrity, a nurse and Captain in the United States Army at the time of her pregnancy and a devoutly religious person whose life and career had been exemplary (JA 152-53, 301-02).

The district court disqualified Allis because of his "preparation and procurement" of a statement from his secretary, Krystyna Janowski (Pet. App. 72a, 75a). The entire sequence of events concerning the "preparation and procurement" of that statement took place within a 24 hour period. On December 26, 1982, at approximately 9 p.m., Allis received a phone call from Richard Daum, a paralegal employed by Allis' firm. Daum reported that Janowski had just called and said that George Barnes, petitioner's counsel's investigator, was pressuring her to sign a false statement that Mrs. Koller had told Janowski that she had never taken Bendectin in the first trimester of her pregnancy (JA 39, 170-71).

Unbeknownst to Allis, his secretary had been in regular contact with representatives of petitioner's counsel during the preceding four days.[2] Also unbeknownst to Allis, petitioner's counsel had made an *ex parte* communication to the chambers of the district court on December 23, 1982, informing the court that someone identifying herself as Allis' secretary was alleging that Mrs. Koller's claim was fraudulent (Pet. App. 11a, 73a; JA

[2] On December 22, Janowski had apparently called the offices of petitioner's counsel and stated that Mrs. Koller had not taken Bendectin during the critical period of her pregnancy (JA 19, 20). Beginning on December 23, Barnes, acting on behalf of petitioner, had made numerous contacts with Janowski (Barnes Dep. 1-25-83, pp. 70-71; Barnes Dep. 1-26-83, pp. 55, 74-77, 81-82, 120-21, 124, 130, 137), and had set up a daily surveillance of Janowski's apartment (JA 74, 271, 274-75, 276, 282, 284-85; Barnes Dep. 1-26-83, pp. 68-69). Additionally, during this period Janowski had met with Patrick Ryan, one of petitioner's attorneys (Ryan Dep. 2-26-83, Ex. 2).

21-22). At no point between December 22 and December 28, 1982, did petitioner's counsel notify Allis or his firm of petitioner's counsel's contacts with Janowski or of her allegations (JA 21-22, 198, 303).

Acting solely on the basis of what Daum had related, Allis set about on Monday morning, December 27, 1982, to learn what was going on. The furthest thing from Allis' mind was that the Kollers might have perpetrated a fraud upon the court; rather, he was concerned that petitioner was engaging in improper conduct, and he wished to get to the bottom of it to protect his clients' interests (JA 177-81).[3] At about 10 a.m., Allis called and spoke briefly on the phone with Janowski (C.A. App. 4311-12). She said that she could not take the pressure petitioner was putting on her, and that she was contemplating moving to Mexico (JA 171-72; C.A. App. 739). Allis told her that if petitioner was engaged in this kind of conduct it should be made known; Janowski should stay and state the facts (JA 171-72, C.A. App. 738-39). Janowski said that she would like to meet with Allis at the hospital, where she was visiting her prematurely born infant (Allis Dep. 2-14-83, pp. 161-62).

Allis immediately went to the hospital and talked with Janowski (JA 172). She reiterated what she had told Daum: that petitioner through Barnes was pressuring her to sign a false statement to the effect that Mrs. Koller had told Janowski that she had not ingested Bendectin during the first trimester of her pregnancy; and that Barnes had promised her that if she signed the statement petitioner would relocate her and take care of all her "wants and needs" including renting an apartment for her and her child (JA 26-27, 171-72, 178, 196). She made clear to Allis that in fact she had never had a conversation with Mrs. Koller relating to the latter's ingestion of Bendectin (JA 173-76, 178, 193, 226-27, 231-37, 243-44). Janowski told Allis that she would be happy to confirm this in a statement (JA 178).

[3] Allis was aware of questionable conduct by Barnes earlier in the case (JA 45-47, 172, 179, 301, 304; C.A. App. 555-58, 789).

During the conversation Janowski said things that led Allis to suspect that Janowski might have led petitioner on, and specifically that at some point she might have placed a call to petitioner's counsel.[4] But she denied telling anyone anything negative about the case (JA 173-76, 178, 193, 226-27, 231-37, 243-44). Nothing Janowski told him caused Allis any doubt about Mrs. Koller's veracity (JA 187, 213). Whatever Janowski might have told petitioner was, in Allis' mind, a reflection on Janowski's veracity and integrity, not Mrs. Koller's (JA 179). That afternoon, Allis' office placed a call to Mrs. Koller to inquire whether she had ever discussed with Janowski the subject of her ingestion of Bendectin. Mrs. Koller denied having had any such conversation with Janowski, and reiterated that she *had* taken Bendectin during the critical period (C.A. App. 652). Allis also learned that earlier that day Janowski had told her best friend that she was being offered $15,000 by petitioner to sign a false statement (JA 64; C.A. App. 668).

That afternoon, Allis reviewed the events with others in his firm (JA 174-75). It was decided that in light of Janowski's indication that she might leave for Mexico, Allis should act quickly to protect the clients' interests, by securing written confirmation of what Janowski had told him orally (JA 179-180).[5] With this purpose in

---

[4] In the conversation at the hospital, Janowski expressed certain grievances respecting the way Allis' firm had treated her (C.A. App. 694), and asked him hypothetically what the significance would be if she had phoned petitioner's counsel (JA 174, 233).

[5] Petitioner attempts to make it appear that there is a conflict in the evidence concerning Allis' motivation in seeking the Janowski statement. Petitioner asserts that Allis knew at this point that Janowski had told petitioner's representatives that Mrs. Koller had not taken Bendectin during the first trimester, and that Allis' purpose in seeking the statement was to obtain a retraction of the statemen made to petitioner. There is "some dispute" as to when Allis learned what Janowski had told petitioner; there is no dispute as to Allis' motivation in seeking the statement. See Pet. App. 17a, n.34. Allis' precise testimony on the latter point was (JA 181):

mind, Allis decided upon the following: First, he would bring along Floyd Humphries, a trained investigator, as a witness (JA 179-80). Second, Humphries would bring a tape-recorder to the interview so that there would be no question as to what was said (JA 177). Originally, Allis had planned to ask Janowski to speak into the tape recorder. But ultimately he decided to do the recording without her knowledge so that it could not later be claimed that the recording was staged, and so that Janowski would speak in a relaxed and spontaneous fashion (*id.*). Third, he prepared a short, simple typed statement containing the basics of what Janowski had already told both Daum and himself (JA 180-81, 196-97).

At approximately 7 p.m. that evening, Allis and Humphries visited Janowski at her apartment. The transcript of the tape-recorded conversation is in evidence (JA 269-95). Janowski recounted her frustrations with Allis' firm over pay and parking problems; she then launched into a description of petitioner's harassment and intimidation of her. She described petitioner's offers of benefits to her. She reiterated that she knew nothing about Mrs. Koller taking or not taking Bendectin, and denied that petitioner had any reason to believe otherwise.

The following passages from the interview reflect its tenor:

> [Humphries]: Honestly, does [Barnes] still have any reasons to feel this—this idea that somehow ah you know or you said that Mrs. Koller talked to you:
>
> [Janowski]: No, he wants me . . . He will bet on somebody to say it. They don't give a hoot. [JA 279]. • • • •

THE COURT: Can you tell us whether [a retraction] was one of the primary purposes, because that's the question?

THE WITNESS: Certainly.

If she had made a statement to Davis, Polk, or to George Barnes that she had heard Cynthia Koller say she did not take Bendectin, certainly I wanted that, the truth, the true statement, the true facts, to be set down here. And that would involve a retraction of any statement like that, yes.

[Humphries]: Did you ever talk to Mrs. Koller?

[Janowski]: Well I've talked to her, but only, you know, to ask her if she wanted coffee and ah, you know, get her on the telephone for Nick Allis. [JA 279-80].

• • • •

[Janowski]: I have never had any conversation with Mrs. Koller—other than would you like some coffee . . . [JA 286].

• • • •

[Janowski]: All [Barnes] looks at is oh look at how terribly you live; and oh you poor woman, oh you poor . . . we can't let your little girl come into this situation. We'll find a beautiful apartment for you [chuckling while saying this]. [JA 278-79].

• • • •

[Janowski]: . . . They've been making tremendous promises about relocating me within twenty-four hours . . . . Really, it's been quite flattering. I've never had such attention. [Chuckling]. [JA 289].

• • • •

[Janowski]: It would have been fun to see what they were willing to pay for that statement. I mean, just for the hell of it! [JA 289].

After making minor corrections in the body of the statement Allis had prepared, Janowski signed it (JA 183, 197, 289-92). Contrary to petitioner's description (Pet. Br. 15), the tape shows that she devoted considerable attention to the text of the statement before signing it.[6]

---

[6] After Janowski received the statement, she referred to the passage in the statement relating to the promises Barnes was making to her to induce her to sign a false statement: "[Janowski]: This is true. They've been making tremendous promises about relocating me within twenty-four hours . . . ." (JA 289). Next, she noticed that "They misspelled remuneration" (*id.*). Then she focused on the sentence that said she was hostile toward Allis' law firm the week before and said: "That was one of the reasons for my hostility, was that I felt that Sandra had been hired to replace me"

The statement contains the very points Janowski had been making orally throughout the interview—points that she had previously stated both to Daum and Allis. The statement reads as follows:

> Last week I was in the state of severe agitation and depression and felt a lot of hostility towards the law firm of Butler, Jefferson, Dan & Allis. Today I feel calm and my mind is free and clear. At no time did I ever hear Cynthia Koller or anyone else say that Cynthia Koller did not take Bendectin. George L. Barnes & Associates, Inc. had been trying to get me to sign a statement saying that I heard Cynthia Koller say that she did not take Bendectin. Such a statement would be false and I would not sign such a statement for that reason. Mr. Barnes and others have promised that if I signed such a statement they would be able to relocate me and would take care of all of my wants and needs including renting a comfortable apartment for me and by [sic] baby. Any conversation I had with George Barnes, Patrick Ryan or any other person from Davis, Polk & Wardwell or George Barnes & Associates was at a time when I was extremely upset and under *great* emotional stress. At the present time my mind is free and clear and everything in this statement is true and correct. I have been promised no remuneration of any kind by any representative of Butler, Jefferson, Dan & Allis for stating these true statements or for anything else. [JA 26-27].

Allis asked if Janowski were willing to make the statement under penalty of perjury, and she then added in her own handwriting, "Under penalty of perjury, I swear that the above-typed statement is true and correct" (JA 27, 184-85; C.A. App. 716).[7]

(JA 290). In the meantime, she made corrections on the statement: underlining the word "great", crossing out the word "feeling", and correcting typographical errors (JA 26-27).

[7] In addition to signing the statement, Janowski also handed Allis a document she had prepared previously (JA 28, 227-28). That document, Janowski told Allis, contained the "conversation"

Allis and Humphries left the meeting believing that the statement Janowski had just signed was true (JA 191, 203, 206, 210, 242-43, 302, 303). Allis had no fixed idea of what he was going to do with the statement (JA 303-04). That question was resolved by events of the next day, when Allis' firm received a copy of a letter that petitioner had sent to the district court, stating:

> On Wednesday, December 22, 1982 our office received two unsolicited telephone calls from a woman who identified herself as secretary to Mr. Nicholas Allis, one of plaintiffs' counsel. These two telephone communications were taken by receptionists at our office in New York City. The message as relayed was that she refused to work on the case because it is "fraudulent".
>
> We inquired of your law clerk whether it would be possible to arrange a conference before the Court closed for Christmas or whether we might have time to at least verify the identity of the caller. As I had indicated to your law clerk we did not then have any information as to her identity or the bona fides of the messages. Since then we have identified the caller as Mr. Allis' secretary.
>
> Having confirmed this, we arranged independent counsel for the person who communicated with us so that he might advise her with respect to the law of attorney-client communications and any possible duty to the Court.
>
> • • • •
>
> We respectfully request a conference with the Court so that it may, if it sees fit, prevent intrusion by any party or its counsel until the informant and her counsel have had an opportunity to evaluate the substance of her information and, if appropriate, inform the Court. [JA 21-22].

---

petitioner wanted her to swear she had had with Mrs. Koller (JA 28). In this "conversation," Janowski observes that Mrs. Koller did not take Bendectin during the first trimester, and Mrs. Koller implicitly agrees (JA 28, 227-28).

This letter was the first communication Allis' firm received from petitioner regarding the Janowski matter.[8] This was also the first Allis' firm had heard of the so-called "independent" counsel that petitioner had "arranged" for Janowski.[9] Allis' firm immediately sent a responsive letter to the court, stating in part:

---

[8] The suggestion in petitioner's brief (at 9) that Allis' firm may have received or known about the letter on Monday, December 27, is inconsistent with the undisputed record evidence. The letter may have been "hand-delivered" to co-counsel Eaton's office in Washington, D.C. late on that date. But Eaton testified that he first saw the letter "sometime prior to 9:19" a.m. on the morning of December 28 (JA 198). Eaton's phone logs indicate that at 9:19 a.m. on the 28th, he placed a call to Butler, who was at home in California, to inform him of the letter (Def. Hrg. Ex. 26). Butler testified to receiving that call "sometime around 6:00 o'clock in the morning" (JA 216). Later that day, a copy of the letter was delivered to Allis' firm.

[9] Janowski had mentioned a Mr. Schuck to both Daum and Allis, but she led them to believe that he was working with petitioner in its effort to obtain a statement from her, not that he was her attorney (JA 39-40, 224, 303). Schuck turned out to be petitioner's "independent" counsel. In fact, Schuck was paid by petitioner, not Janowski (JA 75-79); and Schuck's firm defended other pharmaceutical companies in birth defect litigation, including cases in which the plaintiffs were represented by Allis' firm (JA 32-33, 38). Subsequently, the Koller plaintiffs requested that the court appoint truly independent counsel for Janowski, offering to pay one-half of the cost of such counsel. The court denied the motion without a hearing (JA 32-33, 49-50). The court also ordered that Janowski not be questioned at her deposition about her relationship with Schuck, even though four people—including a former President of the Los Angeles County Bar Association—had submitted affidavits to the court stating that Janowski had told them Schuck was working with petitioner and pressuring her to sign a false statement (JA 33-35, 42, 48-49; C.A. App. 120-22).

After receipt of petitioner's letter, Allis and Butler treated Janowski as if she were represented by counsel, and felt obliged to communicate with her only through counsel (JA 241-42). Petitioner did not feel similarly restricted. On the very next day, Wednesday, December 29, Ryan, one of petitioner's lawyers, met with Janowski for the purpose of taking her statement (Barnes Dep. 1-26-83, pp. 81-82, Ryan Dep. 1-26-83, pp. 154-55). Ryan testified that he and lead counsel for petitioner, Lawrence E. Walsh, had

Based on the conversation of Mr. Allis with Ms. Janowski on Monday morning, a simple statement of what she had told Mr. Allis was prepared and given to her and signed by her, a copy of which is attached. . . .

Obviously this is a serious matter and it is my desire that the court have a hearing at the earliest possible date convenient to the court to decide what would be the proper course to follow. It is also requested that defendants be ordered to cease and desist their attempts to contact this secretary.

. . . With respect to the conversations alleged to have taken place with respect to Mrs. Koller, I have consulted with Mrs. Koller and to the extent of any purported conversation of Ms. Janowski with Mrs. Koller, we are willing to waive the attorney-client privilege as to any inquiry by the court or any independent counsel appointed by the court. Parenthetically, Mrs. Koller has again stated categorically that she took Bendectin during the sensitive period.

We view with extreme seriousness the manner in which defendant has sought to handle this matter by sending representatives repeatedly attempting to have our secretary sign a statement. It also concerns me that a call was made to the court without any notification to our firm regarding the nature of the call . . . .

We are very anxious to have this matter resolved quickly and we of course only wish the disclosure of the full truth. [JA 23-25].

At this point, the sequence of events pertinent to the issue of Allis' disqualification ended. Except as noted, *supra* at n.5, the evidence set forth above is uncontradicted. Petitioner, in an effort to create the appearance of evidentiary conflicts, has made numerous references in its brief to deposition testimony of Janowski. But the district court ruled that the question of disqualification would be determined without regard to whether anything said by Janowski was true or false or whether the statement she gave Allis was true or false (JA 156, 159, 164, 187-88, 247-48, 255, 257-58, 298-99). As petitioner correctly observed in the trial court: "[N]o portion of the evidence adduced by [petitioner] at the evidentiary hearing rested on the truthfulness of the December 27 statement signed by Ms. Janowski. [*Petitioner*] *did not call Ms. Janowski nor did it offer any of her deposition testimony in evidence.*" (JA 258, emphasis added; see also JA 187-88). Accordingly, Janowski's testimony is not part of the evidentiary record on which the district court made its decision. See also Pet. App. 14a, n.27.[10]

---

determined it was unnecessary to contact Schuck before doing so (Ryan Dep. 1-26-83, pp. 141-42): ". . . I remember Judge Walsh saying, 'Well she has not accepted Mr. Schuck as her lawyer. She has made statements to the Butler firm, and it's perfectly alright for us to go forward . . .'" (*id.*, p. 141).

[10] Had Janowski's credibility been an issue in these proceedings, respondents would have presented a mass of evidence showing that the testimony now invoked by petitioner could not be credited. In fact, the record already contains ample evidence to establish that point. For example:

(1) By the time of her deposition in January 1983, Janowski had received from petitioner an apartment, rental car, legal assistance for herself and for her roommate's immigration problems, and other funds (JA 75-79, 140, 141, 334-38). In May and June of 1983, she testified that in addition she had received from petitioner $3,000 in cash, $1,500 worth of medical insurance, as well as other amounts of money (JA 334-38). "Funds come to me, I don't ask any questions. I just take the check and cash it" (JA 337). She also testified that well over $100,000 had been paid by petitioner to the "independent" counsel for her representation (JA 336).

(2) Janowski told at least six different people, including a close personal friend, the former President of the Los Angeles County Bar Association, and a former F.B.I. agent, essentially the same information as is contained in the sworn statement obtained by Allis (JA 33-35, 39, 40-44, 48-49, 64).

(3) Two days after the sworn statement to Allis, Janowski expressly asked representatives of petitioner for a bribe (JA 141, 330; Larsen Dep. 9-15-83, Ex. 15; Barnes Dep. 1-26-83, pp. 102-03).

(4) Janowski had a record of dishonesty while working for two other law firms, as well as in other dealings. In one instance, she

One postscript is worthy of note here. At a deposition of Janowski in mid-January 1983, "independent" counsel for Janowski stated on the record that petitioner was paying for Ms. Janowski's apartment, for her rental car, for her legal fees, for legal fees incurred by her roommate in connection with a separate matter, and for a

---

had telephoned opposing counsel in a divorce case and made false charges regarding her firm's client (JA 167-69).

(5) Several months before Janowski's first contact with petitioner she had begun writing vitriolic letters to friends attacking Allis' law firm for alleged injustices to her with regard to pay and parking (Janowski Dep. 1-25-83, Ex. 17-26, 31-43).

(6) Janowski had a lengthy criminal background with a felony conviction and court-ordered psychiatric treatment, all previously unknown to Allis' law firm (JA 81-83).

The following excerpt from Janowski's testimony at a hearing in which she unsuccessfully sought unemployment compensation from Allis' law firm perhaps best sums up the point (JA 332-34):

> Q. Have you testified in the past that you have invented a web of lies in regard to the Koller situation?
>
> A. Yes.
>
> • • • •
>
> Q. Did you invent lots of things in regard to the Koller case....
>
> A. Yes, I did.
>
> • • • •
>
> Q. . . . Has the following question been asked you and you gave the following answer, "Isn't it a fact, Mrs. Janowski, that as you said yesterday, when you tell lies you can't keep them all straight?" and your answer, "Precisely, that's the problem I'm having now."?
>
> A. Yes, they were questioning me about previous lies and I couldn't remember what I said to whom.

Remarkably, in its brief to this Court, petitioner suggests that Janowski is a credible witness whose deposition testimony was not "shaken" on cross-examination (Pet. Br. 11, n.*). In fact, in that deposition cross-examination she admitted to a series of lies, false accusations, and threats too lengthy to enumerate (*e.g.*, Janowski Dep. 1-25-83, pp. 737, 739, 740, 741, 755, 849; Janowski Dep. 1-26-83, pp. 870, 888, 909, 955, 959).

variety of her living expenses (JA 75-79, 140, 141, 334-38; C.A. App. 1381-83; Barnes Dep. 1-26-83, pp. 43-44).[11]

---

[11] Ironically, petitioner states (Pet. Br. 13) that the December 27 statement was "seriously misleading" in that it recites that "I have been promised no remuneration of any kind by any representative of Butler, Jefferson, Dan & Allis for stating these true statements or for anything else." Petitioner does not seem to contend that Janowski was promised any remuneration *for the statement*. There is no evidence to support such a contention, and the district court made no such finding. See Pet. App. 45a-47a. Rather, petitioner focuses on the phrase "or for anything else," and points to the fact that *after* the statement was signed Janowski arranged with Allis to have her roommate pick up her bi-weekly pay check and her check for unused 1982 vacation on Friday, December 31, the day the checks were due to be paid. Petitioner also points to the fact that Allis and Janowski discussed the possibility of having the firm deliver a typewriter to Janowski's home so that she could work at home while caring for her premature baby—a solution which two experts in legal ethics stated was "the ideal way" to handle the situation. See Pet. App. 46a-47a. But it was no secret that the firm compensated its employees, including Janowski, and neither Allis nor Janowski can plausibly be believed to have intended the statement to suggest otherwise.

Petitioner also complains (Pet. Br. 13) that the statement recited that Janowski's mind was "free and clear," whereas Allis believed her to be "a little bit emotionally unstable," "an emotionally somewhat unbalanced woman." But the district court did *not* find that Allis believed the recitation in the statement to be false. And the undisputed evidence shows that Allis in fact believed it to be true. He testified that he included the recitation in the statement after his meeting with Janowski at the hospital where she appeared to him to be calm (JA 228-30). Allis and Humphries also testified, and the transcript of the tape corroborates, that Janowski seemed relaxed and in good spirits during the interview that culminated in the signing of the statement (JA 208-09, 228-30).

In this connection, petitioner takes out of context (Pet. Br. 13) Butler's testimony that it would have been "reckless" to "call the court, or somebody else, and try to make representations as to what . . . Janowski's statement was" (JA 218). That testimony was in reference to the situation as it stood prior to Allis' obtaining the signed statement from Janowski; indeed, in context, Butler was explaining why he believed the appropriate first step was "to take Mr. Allis, a man whom she respected, . . . and to try to get [the truth] in a form that someone would be ready to accept" (JA 218).

b. *The character evidence.* At the hearing before the district court, six witnesses testified regarding Allis' character. These witnesses included a United States Court of Appeals judge (for whom Allis had been a law clerk), and the Attorney General of California (for whom Allis had worked). All testified emphatically that Allis is a person of the highest ethics and morals and is incapable of guile or cunning (JA 258-62).

c. *The expert testimony.* Two expert witnesses on the subject of legal ethics testified, David Austern and Thomas Lumbard.[12] Each had reviewed the record evidence respecting Allis' conduct (JA 306, 315), and each testified that Allis had acted ethically and properly in all respects (JA 305-22).[13]

2. *The Incident Concerning Butler*

On January 29, 1983, Butler sent a letter, dated January 28, to Commissioner Arthur Hayes of the Food and Drug Administration ("FDA"), stating in part:

> Because of the overwhelming importance of the enclosed documents, I am mailing them directly to you instead of the Medical Section of the [FDA]. These are Adverse Drug Reaction Reports on the drug Bendectin some 14 in number. Each of the cases represented a child who is horribly malformed and in each of the instances the mother took Bendectin during the sensitive period of organogenesis.
>
> • • • •
>
> It appears to me that solely on a humanitarian basis, the time has now come for the [FDA] to do something to warn the public of the dangers of Bendictin. . . . The previous information supplied to you by Congressman Doug Walgren . . . and particularly the studies of Dr. Crescitelli and Dr. Stuart Newman which demonstrates the mechanism of action of doxylamine succinate, the problem ingredient of Bendectin, seems to me to demand an immediate review by the [FDA] to take this noxious product off the market before it can do any more harm. [JA 134-35].

Butler sent copies of the letter and enclosures to the Surgeon General, and to Morton Mintz of the *Washington Post.* The cover letter to Mintz stated: "I have known and admired your articles on the drug industry and I thought that these [enclosures] might be of particular interest to you" (JA 341).[14] The only mention of the *Koller* litigation in the materials sent by Butler to Mintz is the following passage in Butler's letter:

> If you have any questions, I will be in Washington, D.C., from Sunday on at the River Inn. I also will be in court on the *Koller* case before Judge Norma Johnson on January 31 from 10:30am on. [JA 341].

On Tuesday, February 1, 1983, Butler received a phone call from Mintz and "gave him an interview regarding the contents of the material which had been mailed to the

---

[12] Both Austern and Lumbard have studied, taught, and written on legal ethics. Austern served as Bar Counsel to the Board on Professional Responsibility of the District of Columbia Bar and subsequently as a member of that Board and of the Legal Ethics Committee of the District of Columbia Bar (JA 305-306). Lumbard was consultant, associate reporter, and then reporter to the Commission on Professional Responsibility of the Roscoe Pound American Trial Lawyer's Code of Conduct (JA 313-315).

[13] Austern and Lumbard also attempted to testify that the actions of counsel for petitioner were unethical or raised serious ethical questions in the following respects: a) providing remuneration to Janowski; b) failing to obtain truly independent counsel for Janowski; c) continuing to visit and talk to Janowski after arranging for counsel and after writing to the court suggesting that neither party contact her; d) failing to report a bribe solicitation from Janowski (see *supra*, notes 9, 10). The court would not permit this testimony and would not permit plaintiffs to make an offer of proof as to some of it (JA 306-07, 319-21; see also JA 323-24).

[14] Petitioner suggests (Pet. Br. 7) a sinister motive in Butler's choice of Mintz as the person to whom Butler directed a copy of his letter to the FDA. As Butler's letter to Mintz stated, Butler was aware of Mintz's prior writings and interest in the subject matter. The *Post* had previously carried articles dealing with Bendectin under Mintz's byline on February 11, 1980; August 23, 1980; September 16, 1980; September 17, 1980; February 6, 1981; June 25, 1982; August 19, 1982; and September 16, 1982.

Food and Drug Administration" (JA 250). The ensuing article's lone reference to the *Koller* case is the following:

> The plaintiff, Anne E. Koller, 3, has no arms, no right leg and a severely deformed left leg. She was born at Walter Reed Army Medical Center here but now lives in Broken Arrow, Okla.
>
> The company, formerly a unit of Richardson-Merrell, Inc., contends that "Bendectin has been used safely in over 31 million pregnancies," that "there has been no proof of any increase in the incidence of birth defects associated with its use," and that "there is no evidence that it caused Anne Koller's birth defects." In addition, a company spokesman said "there is a serious question when Mrs. Koller may have taken Bendectin." [JA. 129].

The only part of that passage that might have come from Butler is the descriptive material about Anne Koller. The rest of the passage reflects material that was apparently provided to Mintz by "a company spokesman." The 14 Adverse Drug Reaction reports are not referred to as such in the article; the article does refer to "14 cases"—seven where lawsuits had been filed and seven others where "[l]awyers have been retained." Brief descriptions are included as to some of the plaintiffs in these 14 cases. The remainder of the article describes the varying positions of the FDA, the Public Citizen Health Research Group, Butler, and the Merrell Dow Company respecting the dangers of Bendectin. The article's discussion of the dangers of Bendectin is balanced, and the article makes clear that the FDA and other groups believed that there was "no evidence to date establish[ing]" a causal connection between Bendectin and birth defects (JA 129).

At 10 a.m. on February 7, 1983, the morning the *Post* article appeared, petitioner filed a motion, with extensive supporting papers, seeking disqualification of Butler for his communication with the *Post* (JA 95-96, 131). From the timing, it is apparent that this motion had been prepared before the *Post* article appeared. In its papers, petitioner asserted: "[T]he publication of the information conveyed by Mr. Butler to the *Washington Post* will inevitably create unfair prejudice among some of the jury panel" (JA 96).[15]

In support of its motion, petitioner claimed that Butler's sending the materials to the FDA and to Mintz was inconsistent with certain pre-trial evidentiary rulings of the district court.[16] These rulings dealt solely with the question of admissibility of evidence at trial; none purported to restrict the release of this material to government agencies, the press, or the public. Petitioner had not sought, and the court had not granted, any order

---

[15] In May 1983, a jury was selected in another case brought in the District of Columbia in which the plaintiff claimed a birth defect injury caused by Bendectin. The voir dire in that case disclosed that *no* prospective juror had any prior knowledge of any articles about Bendectin in the *Washington Post* or elsewhere (JA 323).

[16] On January 17, 1983, the court had excluded from evidence "drug experience reports" (DERs) relating to two malformed infants—Marco Cordova and Pauline Sand—on which expert witnesses for the Kollers had intended to rely in their testimony (JA 59-63). Materials relating to these two infants were among those furnished by Butler to the FDA and Mintz.

On October 19, 1982, the court had entered an order excluding "testimony or evidence" relating to petitioner's efforts to market the drug Thalidomide (JA 13; H.T. 10-13-82, pp. 28-31; H.T. 10-19-82, p. 3). The *Post* article contains a reference to Thalidomide for which Butler might have been the source (JA 129).

In another order, dated January 28, 1983, but filed January 31, 1983—which Butler did not know about when he wrote to Mintz but did know about when Mintz interviewed him—the court ruled that, of the hundreds of DERs on file with the FDA showing mothers who had taken Bendectin and then given birth to infants with absent or seriously malformed extremeties, the plaintiffs would be permitted to introduce into evidence only five—of plaintiffs' choosing—each of which must have been initiated within a year of the birth of the deformed child (JA 90-91). That order made clear, however, that the plaintiffs would be permitted to "elicit testimony concerning the number of DERs," thus permitting the jury to be informed of the "approximately five hundred DERs referring to Bendectin" (JA 85, 89). The material furnished by Butler to the FDA and Mintz on January 29 had included reports initiated more than a year after birth of the infant.

restricting communications with any outside party. No information in the case respecting the effects of Bendectin was under seal. All such materials in the record of the case were at all times accessible to the press and public.

At the time Butler sent the materials to Mintz, a pretrial hearing was scheduled for January 31, 1983, and the district judge "contemplated" that trial would be "in February or March" (JA 247). The jury had not yet been selected, although the overall jury pool for February trials had been enlisted.

The only evidence respecting Butler's motivation in sending the material to Mintz is contained in two affidavits submitted by Butler to the court. In his first affidavit, dated February 14, 1983, Butler stated (JA 137):

> I have examined all of the evidence concerning the drug Bendectin and discussed the matter with experts, and I am of the opinion that the evidence is overwhelming and that the drug undoubtedly is responsible for malformations in children, and that the sooner it is taken off the market, there will be less danger to the unborn. I have devoted the last two years of my life to an unceasing effort to see that this drug is removed from the market. In talking to the press, there was no motive other than to get the drug off the market.

In his second affidavit, dated May 29, 1983, Butler expanded on that point (JA 250):

> I never interpreted the various evidentiary orders cited by the court in the Order to Show Cause to be an order that would prevent me from communicating with the Food and Drug Administration or the press or any of the media. My discussions with Morton Mintz of the Washington Post was not intended in any way to have violated any court order made in the *Koller* case and was not intended in any way to influence any juror or potential juror. . . . I believe that the Bendectin controversy is a matter of high public importance and it must be brought to the attention to the government and to the public that the continuance of this drug on the market represents high risk to pregnant mothers and to the infants in utero . . . .

Butler also explained, in that second affidavit, the timing of his communication with the FDA and Mintz (JA 250):

> Research [by Butler] . . . regarding the 14 children was started as early as October 1982 with the obtaining of the medical records and accurate information concerning the children. The authorization[s] obtained for the release of the information to the Food and Drug Administration and the media [were] obtained during the month of January 1983.

Again there is a postscript to these events. Whether as a result of Butler's efforts or otherwise, petitioner announced on June 9, 1983 that it was stopping the production of Bendectin.[17]

B. The Opinion of the District Court

On January 6, 1984, the district court issued an order disqualifying Allis, Butler, and their firm from representing the plaintiffs in the *Koller* case. The court made *no* finding that either Allis or Butler had violated any ethical standard. Nor did the court find that the actions of these lawyers would in any way interfere with the ability of the court to conduct a fair trial in the *Koller* case. Rather, because Allis and Butler were appearing *pro hac vice*, the court believed it had the power to revoke their appearances without finding a defined act of wrongdoing. As the court put it, "conduct which may fall short of a violation of a Disciplinary Rule of the Code of Professional Responsibility may be sufficiently impermissible to warrant the . . . revocation of an attorney's pro hac vice appearance." Pet. App. 75a.

Pursuant to this broad assertion of power, the district court faulted Allis for "preparation and procurement" of the written statement of his secretary. Pet. App. 75a.

---

[17] Petitioner's press release stated that the drug could cause no harm and that its discontinuance was required because Bendectin was a "victim of these litigious times" (JA 297).

The fault, the court said, was that Allis "zealously pursue[d] the interest of his clients" while neglecting his "duty and ethical obligation . . . to investigate whether Cynthia Koller was committing a fraud upon the court thereby making the suit worthless and a waste of judicial resources" (Pet. App. 76a). The court believed that Allis had a *duty* to the court to investigate a possible fraud by his client—even though the court did not find, and the evidence would not have supported a finding, that Allis lacked a reasonable basis for believing in the good faith of the Kollers' claim. That *duty*, the court stated, obliged Allis to abandon "pursuit of protecting the interests of his clients" in favor of "an investigation where the objective is to ascertain the truth and thereby to assist in preventing any acts of fraud upon the court" (Pet. App. 77a). Allis' failure to so abandon his clients' interests—his preparation and procurement of the statement from his secretary—"can be characterized as an attempt to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients" (*id.*).[18]

With respect to Butler, the court concluded that the release of information to Mintz was a "flagrant circumvention" of the court's evidentiary rulings. *Id.* "Butler's refusal of the Court's suggestion that he explain his actions during the hearings merely buttress the Court's conclusion that his release of the DERs to the media was

[18] On the assumption that Allis had a duty to investigate his clients, the court pointed to four aspects of Allis' conduct that made "evident" Allis' impropriety in preparing and procuring the statement (Pet. App. 76a-77a):

> 1) Allis' collaboration with Humphries to surreptitiously record a portion of his conversation with Janowski; 2) Allis' testimony under oath that he had no intention of informing the Court of the findings of his "investigation"; 3) Allis' failure to read the prepared statement line-by-line to Janowski to ensure that she understood the contents of the statement before signing; and 4) Allis' procurement of the statement irrespective of the erratic behavior displayed by Janowski during his visit on December 27.

calculated to prejudice the defendant's case and circumvent the Court's prior rulings" (Pet. App. 78a).[19]

C. The Opinion of the Court of Appeals

The *Koller* plaintiffs, as well as Allis, Butler and their law firm, took an immediate appeal from the district court's disqualification order, and moved to stay commencement of the trial pending resolution of the appeal. (The trial was imminent, and Butler and Allis were the only attorneys prepared to try the case).[20] The district

[19] As noted *supra* at 18-19, Butler's testimony was submitted in two affidavits. The court's reference is apparently to a colloquy in which the court inquired of Butler's counsel whether he "wish[ed] to present any witnesses" and counsel responded that "[w]e do not wish to present anything further" (JA 139).

[20] Petitioner repeatedly asserts that the Kollers "were represented by eight attorneys of record." *E.g.*, Pet. Br. at 3, 48. But the record is clear, and uncontradicted, that Butler and Allis had borne the primary responsibility for pre-trial preparation of the case and were expected by their clients and by their co-counsel to be the principal trial attorneys (JA 250-53, 331-32; C.A. App. 908-21, 1063.9-.11). Indeed, of the other six "attorneys of record" only two had any significant involvement in the case at the time of the events in question, and that involvement was strictly in a supportive role to Butler and Allis (JA 250-53, 331-32; C.A. 908-21, 926-27, 935, 1063.9-.11; H.T. 3-7-83, pp. 3-7, 12). The issues relating to liability in this case are of the greatest complexity, cutting across the fields of embryology, dysmorphology, chemistry, pharmacology, obstetrics, teratogenicity, epidemiology, neurology, and statistics. Butler and Allis had immersed themselves in the literature of each of these fields. They had found, interviewed, prepared, and attended the depositions of 17 or 18 expert witnesses who were to testify in the plaintiffs' case at trial; petitioner had identified as many as 80 expert witnesses to testify in petitioner's case, and Allis and Butler had undertaken the sole responsibility to prepare to meet the testimony of these experts at trial (C.A. App. 908-21; Dkt. No. 786, Eaton Aff., pp. 3-4). Butler stated that his work in the *Koller* case had consumed "at least 80 percent of the time [I have] devoted to the law practice in the last two years[.] I believe that I have personally worked at least 3,500 to 4,000 hours [in the case] and that Mr. Allis has worked at least 2,000 hours and that . . . paralegals and other people in the office worked at least another additional 1,000 hours" (JA 252; see also C.A. App. 911).

court denied the stay. Upon motion, the Court of Appeals granted a stay, and directed expedited consideration of the appeal. After briefing and argument, that court reversed the disqualification order.

At the threshold of its opinion, the Court of Appeals held that orders disqualifying counsel in civil cases are immediately appealable under the collateral order exception to the final judgment rule (Pet. App. 23a-33a). The court found each of the prerequisites of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), to be present. The court carefully considered this Court's decision in *Flanagan v. United States*, —— U.S. ——, 104 S.Ct. 1051 (1984) (holding a disqualification order in a criminal case not immediately appealable), and concluded that the considerations that led to the result in *Flanagan* are not present in civil cases.

Turning to the merits of the appeal, the court rejected the linchpin of the district court's holding: that, under the applicable local rules of court, "*pro hac vice* counsel, once admitted, are subject to disqualification more readily than regularly admitted counsel" (Pet. App. 34a-35a). "Particularly in the federal courts of the District of Columbia, we think it would be unwise to introduce into litigation an unwarranted disadvantage against parties with non-resident counsel by subjecting that counsel more readily to removal" (Pet. App. 35a).

At the urging of petitioner, the Court of Appeals proceeded to consider whether "the conduct of Allis and Butler provides adequate grounds for disqualification under the standards applicable to regularly admitted attorneys" (*id.*). Agreeing with the Second Circuit's approach in *Board of Education of New York City v. Nyquist*, 590 F.2d 1241 (1979), the court stated the following guiding principles (Pet. App. 38a-39a, & n.49):

> We agree that disqualification is warranted only rarely in cases where there is neither a serious question as to counsel's ability to act as a zealous and effective advocate for the client, . . . nor a substantial possibility of an unfair advantage to the current client because of counsel's prior representation of the opposing party . . . or prior responsibility as a government official . . . . Except in cases of truly egregious misconduct likely to infect future proceedings, other means less prejudicial to the client's interest than disqualifying the counsel of her choice are ordinarily available to deal with ethical improprieties by counsel.[49]

[49] For example, the court may issue a formal reprimand or, in more serious cases, a contempt citation either during or after the proceedings; it may also refer possible ethical improprieties to the disciplinary bodies of the local bar or, in the case of attorneys admitted *pro hac vice*, to the bar of the attorney's home state.

Applying these principles, the court concluded that Allis' actions "did not constitute misconduct" (Pet. App. 47a-48a). The court rejected the district court's premise that Allis had a duty to abandon vigorous pursuit of his clients' interests so that he could engage in a "true investigation" of whether his clients were committing a fraud on the court. The court explained:

> Counsel in both criminal and civil cases frequently face situations in which there is some evidence tending to cast doubt upon the credibility of the client or the validity of the claim. Yet the adversary system is based on the premise that the truth is better ascertained in such instances through the zealous and competent presentation by each side of its strongest case. The fundamental obligation of an attorney to his client—the bedrock principle of the adversary system—does not dissolve with the appearance of unfavorable evidence or even an allegation of fraud. The attorney's duty to the client is, of course, not without limits. In the familiar words of Canon 7 of the Code, "[T]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously *within the bounds of the law*," EC 7-1 (emphasis added). The legal profession continually struggles to define the point at which the attorney's

basic loyalty to the client must give way, for that point is very much at the heart of the adversary system. [Pet. App. 39a-40a].

The court determined the locus of that point by reference to the Disciplinary Rules of the Code of Professional Responsibility. Those rules require an attorney to act contrary to his client's interests only if he "knows or it is obvious" that evidence is false, or if he "receives information clearly establishing that . . . [h]is client has . . . perpetrated a fraud." The court reasoned:

> The Disciplinary Rules require objective and informed recognition by an attorney that specific evidence or a client's claims are fraudulent before imposing on the attorney an affirmative obligation to take actions that may be contrary to the interests of the client. An attorney faced with a potential conflict between the duty to the client and the duty not to perpetrate a fraud on the tribunal is entitled to rely on the standards of the Code of Professional Responsibility and should not be disqualified for conduct that falls within the general ambit of those provisions but does not violate the Disciplinary Rules. To permit disqualification for purported misconduct that falls short of a violation of these standards might well penalize conduct that could reasonably be deemed mandatory in fulfilling the duty to pursue zealously the interests of the client. [Pet. App. 40a-41a].

In evaluating Allis' conduct under the objective requirements of the Disciplinary Rules, the court accepted the factual findings of the district court and relied upon additional facts that were undisputed in the record of the case. The court concluded:

> In the absence of any finding—or indeed any evidence—that Allis knew or that it was obvious that Janowski's claims to him were false or his clients' case fraudulent, we can find no impropriety in his visit to Janowski for the purpose of obtaining a "retraction" of any damaging and, according to Allis' belief, false statements made to the defense. [Pet. App. 42a, footnote omitted].[21]

With respect to Butler, the Court of Appeals again accepted for purposes of its analysis the factual findings of the district court.[22] Although the district court had not found Butler to have violated any ethical standard, petitioner urged the Court of Appeals to find that Butler's conduct violated Canon 20, District of Columbia Code of Professional Responsibility DR 7-107(H), which deals with press comments by counsel in civil cases. The Court of Appeals expressed doubt that Canon 20 prohibited Butler's speech, and noted that significant constitutional

---

[21] The Court of Appeals examined separately each of the four specific aspects of Allis' conduct to which the district court had referred, see note 18, *supra*, as well as two additional aspects of Allis' conduct not referred to by the district court but raised by petitioner on appeal. As to each, the court accepted the factual findings of the district court but found that the conduct was not improper. Pet. App. 43a-48a.

Petitioner suggests (Br. at 14 n.*) that taping the conversation with Janowski without her knowledge was unethical and may have violated § 632(a) of the California Penal Code. Neither assertion is correct. The conversation was not a "confidential communication" covered by § 632(a) as it was not "carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties." Cal. Penal Code § 632(c); see also *id.* § 633.5; *People v. Ayers*, 51 Cal. App. 3d 370, 124 Cal. Rptr. 283 (1975). Janowski was aware that one of the participants in the conversation was a private investigator; and in the course of the conversation Janowski signed a statement that she knew might later be used in public proceedings. Nor were ordinary ethical limitations on tape recording applicable here. In rejecting petitioner's ethical challenge to the taping, the Court of Appeals relied on "the expert testimony that the use of a secret recording was proper under the peculiar circumstances Allis faced," Pet. App. 47a (footnote omitted)—testimony that took into account the bar opinions cited by petitioner. JA 309-10, 315-17.

[22] The court expressed doubt "as to the basis for the [district] court's finding that Butler's intent was to 'prejudice the defendant's case' and circumvent the [district] court's evidentiary rulings" (Pet. App. 51a). But the court's disposition made it unnecessary to decide whether that finding should be overturned. *Id.*

issues would be raised by a proscription of communications relating to issues of public importance transcending a particular case—here, whether the FDA should ban a drug from the market. Pet. App. 52a, 54a & nn.63, 65. But, applying the guidelines it had previously set forth, the court found it unnecessary to decide whether Butler had violated Canon 20 (Pet. App. 56a 71a):

> While Butler's decision to release the DERs to the press precisely when he did is not to be applauded, we do not believe that this record could support a finding that his conduct was likely to infect future proceedings. Under these circumstances, we cannot approve his disqualification, with the attendant prejudice to his clients, on the basis of this episode.

SUMMARY OF ARGUMENT

1. The disqualification order here satisfies each of the three criteria for appealability under the "collateral order" doctrine. The order conclusively determined the disputed question: Allis and Butler were removed from the case without any contingency or qualification. The order resolved an important issue completely separate from the merits of the action: the correctness of the order is an issue entirely distinct from the issues to be tried on the merits of the case and can be answered now without regard to the merits. The order would be effectively unreviewable on appeal from a final judgment: improper disqualification of counsel prior to trial has, for good reason, never been recognized as a basis on which to challenge a judgment on the merits in a civil case. The rationale of *Flanagan*—holding disqualification orders in *criminal* cases not appealable—does not apply here.

2. On the merits, the district court did not find that either Allis or Butler violated any ethical standard. That court believed that because Allis and Butler were appearing *pro hac vice*, it had the power to revoke their appearances without any finding of wrongdoing. The Court of Appeals rejected that assertion of power, and petitioner does not challenge that rejection in this Court.

The Court of Appeals also determined that under the standards applicable to regularly admitted attorneys, Butler and Allis could not, on this record, be disqualified. The court properly ruled that disqualification for "misconduct" is permissible only when (a) the attorney has committed a violation of legal or ethical norms, and (b) the violation is of a nature "likely to infect future proceedings" (Pet. App. 38a). The court did not overturn any of the district court's findings of fact. The court correctly determined that Allis' conduct was not a violation of any ethical norm; that determination was based on a construction of the Disciplinary Rules which is not challenged in this Court. The court correctly determined that there is no basis on this record for a finding that Butler's conduct was "likely to infect future proceedings," and thus found it unnecessary to decide whether Butler's conduct violated the Disciplinary Rule relating to attorney communications to the press. In any event, Butler's conduct did not violate that Disciplinary Rule; and, if, *arguendo*, that Rule prohibited Butler's speech, the Rule would violate the First Amendment.

ARGUMENT

I. THE DISQUALIFICATION ORDER WAS IMMEDIATELY APPEALABLE.

The threshold question in this case is whether the court of appeals had jurisdiction to entertain the appeal taken by the Koller plaintiffs and by Allis, Butler, and their law firm from the disqualification order entered by the district court.

Jurisdiction for that appeal was asserted under 28 U.S.C. § 1291, which provides, in pertinent part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." This Court has determined that § 1291 jurisdiction is not limited to "appeals only from those final judgments which terminate an action," *Cohen v. Beneficial Loan Corp.*, 337 U.S. at 545-46, for there is a

> small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.

The criteria set forth in *Cohen* have more recently been refined by this Court as follows:

> First, [the order appealed from] "must conclusively determine the disputed question"; second, it must "resolve an important issue completely separate from the merits of the action"; third, it must "be effectively unreviewable on appeal from a final judgment." [*Flanagan v. United States*, 104 S.Ct. at 1055].

We show herein that the disqualification order in this case satisfies these criteria. We then show that the rationale of this Court's decision last Term in *Flanagan*—holding that orders disqualifying attorneys in criminal cases are not immediately appealable—does not support a like result in civil cases.

1. On the eve of a major, complex trial, the district court disqualified plaintiffs' principal counsel. The action of the district court placed the Kollers' case at a great disadvantage. Allis and Butler had devoted approximately 6,000 hours to preparation of the case, and were the only counsel prepared to present this complex case at trial (*supra*, n.20). At best, replacement counsel could replicate the trial preparation of Allis and Butler only after a lengthy period of concentrated work. Moreover, the action of the court was injurious to Allis and Butler. It deprived them of the opportunity to complete their professional service to their clients and put to waste a vast amount of their effort; and it cast a cloud over their standing in the legal profession.

The disqualification order here plainly meets the first criterion for appealability under the "collateral order"

doctrine: it "conclusively determine[d] the disputed question." Allis and Butler were removed from the case without any contingency or qualification. Nothing that would happen thereafter in the district court would undo that removal. *Cf. Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375-76 (1981).

Similarly, the second criterion of appealability unquestionably is met here: the order "resolve[d] an important issue completely separate from the merits of the action." That the issue is "important" is evident (see *supra* at 28). That the issue is "separate" is equally apparent. The merits of the action concern whether Bendectin caused Anne Koller to be born without arms and legs. The disqualification issue concerns whether the court may disqualify Allis and Butler based on Allis' "preparing and procuring" Janowski's statement and on Butler's communicating with the press. The disqualification issue turns on application and interpretation of the local rules of the district court, the local disciplinary rules for attorneys, and the limits on a trial court's power to supervise the conduct of civil trials. Measurement of the district court's order against these standards does not implicate resolution of any question going to the merits of the case. The correctness of the district court's order can be decided now. The disqualification issue is thus "collateral to, and separable from the principle issue at the . . . impending . . . trial." *Abney v. United States*, 431 U.S. 651, 659 (1977).[23]

---

[23] There may be some cases, unlike this one, where the propriety of a disqualification order may depend upon knowledge of what ensues at trial. For example, the Sixth Circuit, in *Kahle v. Oppenheimer & Co.*, 748 F.2d 337 (1984), held that where disqualification is because counsel is needed as a witness at trial, the disqualification issue is " 'enmeshed in the factual and legal issues comprising the cause of action' " and thus is not "sufficiently 'independent' or separate to allow for appellate review until completion of trial." The *Kahle* Court did not "decide" whether the same result would follow in "civil cases where disqualification is based on misconduct, conflict of interests or other reasons." Only the Fifth Circuit, in *Gibbs v. Paluk*, 743 F.2d 181, 184-85 (1984), has ruled that

The issue of appealability under the "collateral order" doctrine thus comes down to the third criterion: the order "must be effectively unreviewable on appeal from a final judgment." The question posed is this: if replacement counsel tried the case on the merits, and there eventuated a judgment for petitioner or a damage award not satisfactory to the Kollers, would the Kollers be able effectively to appeal the judgment on the ground that the disqualification of Allis and Butler was improper? We are aware of no case, and petitioner has cited none, where improper disqualification of counsel prior to trial was recognized as a basis on which to challenge a judgment on the merits in a civil case.

In a civil case, "[t]he fact that counsel was improperly disqualified would not, in itself, be sufficient to warrant a new trial since . . . there is no presumption of prejudice which attaches to such disqualification." *Gough v. Perkowski*, 694 F.2d 1140, 1143 (9th Cir. 1982). And, our research has failed to disclose a single case where a court has considered, much less approved, a contention that a civil judgment should be overturned because a party's ability to put on his case was prejudiced by an order disqualifying his chosen counsel. The courts that have speculated on such a ground for a post-judgment appeal in a civil case have uniformly concluded that a post-judgment inquiry into prejudice would be "an exercise in futility," *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 719 (7th Cir. 1982), and "would impose an unrealistic burden on the courts," *Gough*, 694 F.2d at 1144. *Accord, e.g., Armstrong v. McAlpin*, 625 F.2d 433, 441 (2nd Cir. 1980) (*en banc*), *vacated on other grounds*, 449 U.S. 1106 (1981); *Duncan v. Merrill Lynch*, 646 F.2d 1020, 1025-27 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981); Pet. App. 29a. These decisions have

---

disqualification orders in civil cases *per se* do not meet the second *Cohen* factor, and its opinion does not offer a defensible rationale for that ruling. See *id.* at 185-86 (Jolly, J., dissenting). All other Circuits have held that the second factor *is* met in the case of disqualification orders in civil cases. See *infra*, n.26.

recognized that such an appeal would necessarily turn on the subjective and standardless question whether disqualified counsel would have conducted the trial in a sufficiently superior manner to the performance of substitute counsel as to have altered the outcome of the litigation. Thus, if post-judgment appellate review of an order disqualifying counsel in a civil case were permitted, "[t]he argument in most cases would quickly degenerate into speculation and hindsight, and a proper decision would be extremely difficult, if not impossible, to arrive at." *Gough*, 694 F.2d at 1144.[24]

For these reasons,[25] the courts of appeals have uniformly reached the conclusion stated by the court below (Pet.

---

[24] The decision in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981)—holding that an order *denying* a motion to disqualify opposing counsel is not subject to immediate appeal—is not to the contrary. The order in *Firestone* (refusing to disqualify a lawyer for the plaintiffs whose firm represented the defendant's insurance company in other matters) was found not to satisfy the third criterion of the "collateral order" doctrine. The Court reasoned that if the lawyer's dual interests harmed the *opposing party's* interests at trial—in a way that that party had standing to raise (see 449 U.S. at 379, n.14)—then the ruling would merge into the judgment and be a ground for challenging the validity of the judgment. That issue is different from whether a judgment is subject to attack simply because one lawyer, rather than another lawyer, tried the case.

[25] There are other reasons for concluding that a post-judgment appeal from a disqualification order in a civil case could not adequately protect the interests of those involved. Even if his former client prevails, the improperly disqualified attorney "is not likely to find any remedy for the damages to his reputation or to his pocketbook." *Duncan v. Merrill Lynch*, 646 F.2d at 1027; *accord, e.g., Freeman v. Chicago Musical Instrument Co.*, 689 F.2d at 720. Unlike the field of criminal defense, where contingent fees are prohibited, D.C. Code of Professional Responsibility DR 2-106(C), many civil cases are undertaken on a contingent basis as a matter of financial necessity. The erroneous disqualification of an attorney in a contingency case may well destroy the disqualified attorney's hope of ever obtaining compensation for the work he has put into a case. D.C. Bar Legal Ethics Comm., Formal Op. 37 (1977). See also Pet. App. 30a.

App. 30a): "it is clear that there can be no effective review at the end of the case."[26] That a civil case is tried by one counsel rather than another has never been understood to be a basis for overturning the judgment of the trial court.

Accordingly, the disqualification order in this case satisfies all three of the requirements for appeal under the "collateral order" doctrine.

2. *Flanagan* did not purport to change the criteria for determining when an order is appealable under the "collateral order" doctrine. Indeed, *Flanagan* restated and applied those criteria. See *supra* at —. The reasons which impelled this Court to find the order in *Flanagan* not immediately appealable are not applicable here.

---

[26] Prior to *Flanagan*, the uniform view of the Circuits was that an order disqualifying counsel in a civil case is subject to immediate appeal. *Armstrong v. McAlpin*, *supra* (2d Cir.); *International Business Mach. v. Levin*, 579 F.2d 271, 277-78 (3rd Cir. 1978); *Aetna Casualty & Sur. Co. v. United States*, 570 F.2d 1197, 1200 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978); *Duncan v. Merrill Lynch*, *supra* (5th Cir.); *General Mill Supply Co. v. SCA Serv., Inc.*, 698 F.2d 704, 706 (6th Cir. 1982); *Freeman v. Chicago Musical Instrument Co.*, *supra* (7th Cir.); *In re Multi-Piece Rim Prod. Liab. Litig.*, 612 F.2d 377, 378 (8th Cir. 1980), *vacated on other grounds sub nom. Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *Gough v. Perkowski*, *supra* (9th Cir.); *Norton v. Tallahassee Memorial Hosp.*, 689 F.2d 938, 941 (11th Cir. 1982); *Groper v. Taff*, 717 F.2d 1415, 1417 (D.C. Cir. 1983), *Ah Ju Steel Co. v. Armco, Inc.*, 680 F.2d 751, 752-53 (C.C.P.A. 1982).

After *Flanagan*, the court below in the instant case, the Second Circuit in *Interco Sys., Inc. v. Omni Corp. Serv.*, 733 F.2d 253, 254-55 (1984), the Ninth Circuit in *American Protection Ins. Co. v. MGM Grand Hotel*, 748 F.2d 1293 (1984), and the Federal Circuit in *Panduit Corp. v. All States Plastics Mfg.*, 744 F.2d 1564 (1984), have all, after considering the analysis in *Flanagan*, adhered to the view that an order disqualifying counsel in a civil case is immediately appealable. Neither *Kahle v. Oppenheimer & Co.*, nor *Gibbs v. Paluk*, discussed at n.23, *supra*, hold that there can be effective review of a disqualification order after trial; both cases turn on the second criterion for immediate review, not the third.

a. *Flanagan* rests heavily on factors peculiar to criminal litigation. The " 'policy [disfavoring prejudgment appeals] is at its strongest in the field of criminal law.' " 104 S.Ct. at 1054. Unlike a civil litigant, a criminal defendant is guaranteed a speedy trial by the Sixth Amendment. In addition, "there is a societal interest in providing a speedy trial" in criminal cases, because of concern for "the prosecution's ability to meet its burden of proof," "the cost of pretrial detention," "public anxiety over community safety," and the community's "strong collective psychological and moral interest in swiftly bringing the person responsible to justice." *Id.* These "compelling interest[s]" have led the Court to "interpret[] the requirements of the collateral order exception to the final judgment rule with the utmost strictness in crimial cases." *Id.* at 1055. But these interests, while "compelling in the administration of *criminal* justice," *id.* at 1054 (emphasis added), provide no reason to hold that disqualification orders in *civil* cases are not immediately appealable. Indeed, in the civil context, significant harm to the judicial process and to civil litigants would result if pre-trial appeals were *not* permitted. The court below succinctly explained why this is so (Pet. App. 27a, 57a):

> The tactical use of motions to disqualify counsel in order to delay proceedings, deprive the opposing party of counsel of its choice, and harass and embarrass the opponent has become so prevalent in large civil cases in recent years as to prompt frequent judicial and academic commentary. *See, e.g., Board of Education of New York City v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *Williamsburg Wax Museum v. Historic Figures, Inc.*, 501 F.Supp. 326, 331 (D.D.C. 1980), *aff'd sub nom. National Souvenir Center, Inc. v. Historic Figures, Inc.*, Nos. 82-2329, *et al.*, slip op. at 27-28 (D.C. Cir. Feb. 10, 1984); Crocker, "The Ethics of Moving to Disqualify Opposing Counsel for Conflict of Interest," 1979 Duke L.J. 1310; Comment, 45 U. Chi. L. Rev. 450

(1978).[27] We are aware of no comparable phenomenon in criminal cases. The apparent interest of many civil litigants in delaying adjudication and their use of disqualification motions to help accomplish that end militate in favor of immediate review of orders granting such motions. To insulate from prompt review an erroneous order granting a motion to disqualify counsel would only raise the stakes in this dangerous game.

• • • •

The disruption and delay of proceedings on the merits, such as we have seen in this case, are unhappily foreseeable byproducts of the injudicious use of disqualification motions by opposing counsel. We fear the intrusive potential of such motions would be exacerbated were orders disqualifying counsel not immediately appealable. In complex, costly product liability cases of this type, the plaintiff may have no realistic or comparable alternative to current counsel; counsel are not fungible.

Petitioner's behavior in this case is illustrative. Why has petitioner devoted massive and expensive resources to the time-consuming effort to have Allis and Butler dis-

[27] See also, *e.g.*, *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290, 295 (6th Cir. 1979); *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976); *Redd v. Shell Oil Co.*, 518 F.2d 311, 315 (10th Cir. 1975); Bayer & Abrahams, *The Ethics of Moving for Disqualification of Opposing Counsel*, 13 Colorado Lawyer, Jan. 1984, at 55; Hilliker, *Attorney Disqualification Motions*, 26 The Practical Lawyer, Oct. 15, 1980, at 11, 13-14; Van Graafeiland, *Lawyer's Conflict of Interest—A Judge's View (Part II)*, N.Y.L.J., July 20, 1977, at 1, col. 2.

Contrary to petitioner's suggestion (Br. at 27), the judicially noted misuse of motions to disqualify opposing counsel in civil cases has not been limited to motions based on alleged conflicts of interest. See, *e.g.*, *W.T. Grant Co. v. Haines*, 531 F.2d 671 (2d Cir. 1976) (questioning opposing party without counsel present); *Lefrak v. Arabian Am. Oil Co.*, 527 F.2d 1136 (2d Cir. 1975) (unsuccessful solicitation of additional plaintiffs); *J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357 (2d Cir. 1975) (attorney as witness); *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268 (2d Cir. 1975) (pre-litigation communication with opposing party).

qualified? The answer is that petitioner still hopes to separate the Kollers from the counsel of their choice—the only lawyers on the plaintiffs' side who have done the massive work necessary to try this complex case; has already gained a lengthy delay and disruption in the proceedings on the merits; and has become privy to privileged communications between the Kollers and their lawyers.

As the court below stated, to deny prompt appellate review in cases such as this "would only raise the stakes in this dangerous game." As there is no effective *post*-trial review, litigants would have the prospect of gaining a great tactical advantage through abusive motions to disqualify that, if successful in the district court, would be beyond correction. That prospect would magnify the incentives for filing such motions. Thus, in contrast to the criminal context, the consequences of holding that disqualification orders in civil cases may not be appealed would be contrary to the policies that undergird the final judgment rule: fostering "the efficient administration of justice" and restricting "the ability of litigants to harass opponents." *Flanagan*, 104 S.Ct. at 1054.[28]

b. The other predicate for the ruling in *Flanagan* also turns on a factor not present here. The defendants in *Flanagan* attacked the disqualification of their lawyers

[28] The frequent abuse of motions to disqualify opposing counsel in civil cases provides a further reason for distinguishing between the appealability of orders *granting* disqualification and orders *denying* disqualification. "Unlike appeals from orders granting disqualification, appeals from orders denying disqualification afford virtually unlimited possibilities for abuse." Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. Chi. L. Rev. 450, 466 (1978). When a trial court has *denied* a motion to disqualify, "an appeal might significantly delay the trial and might be taken on wholly spurious grounds." *Id.* at 464. By contrast, the party seeking to overturn an order *granting* disqualification in a civil case, unlike the motion's proponent, typically has no interest in unduly prolonging the litigation. "Thus, it is far less likely that appeals from orders granting disqualification motions will be taken purely for tactical reasons." *Armstrong v. McAlpin*, 625 F.2d at 441.

on two constitutional grounds: "their Sixth Amendment right to assistance of counsel and . . . their Fifth Amendment due process right to present a common defense through joint counsel." 104 S.Ct. at 1053. It was clear that these constitutional challenges could be asserted on appeal after a conviction as grounds to set aside the conviction. As this Court stated, the constitutional rights asserted in *Flanagan* are, "like virtually all rights of criminal defendants, merely [rights] not to be convicted under certain circumstances." *Id.* at 1056.

Flanagan did not determine the elements a criminal defendant would have to establish in order to upset a conviction on either of these grounds. The Court decided that whatever the elements of these constitutional claims, one or another of the criteria for immediate appealability would not be satisfied. If these rights are like other Sixth Amendment rights, "[o]btaining reversal [of a conviction] for violation of such a right [would] not require a showing of prejudice to the defense, since the right reflects constitutional protection to the defendant's free choice independent of concern for the objective fairness of the proceeding." *Id.* On that assumption, "a pretrial order violating the right does not meet the third condition for coverage by the collateral order exception: it is not 'effectively unreviewable on appeal from a final judgment.'" *Id.* *Flanagan* continued (*id.* at 1056-57):

> If, on the other hand, [the] right is one that is not violated absent some specifically demonstrated prejudice to the defense, a disqualification order [in a criminal case] still falls outside the coverage of the collateral order exception. . . .
>
> On this assumption, a disqualification order, though final, is not independent of the issues to be tried. Its validity cannot be adequately reviewed until trial is complete. . . . In these circumstances the second . . . condition for immediate appealability as a collateral order is not satisfied: the disqualification order does not resolve an "issue completely separate from the merits of the action."

Flanagan thus turned on the nature of the constitutional rights being asserted in that case—rights "not to be convicted under certain circumstances." By definition, those rights could not be violated unless and until a conviction occurred. Depending on whether a showing of prejudice is an element of establishing a violation of those rights, a claim of violation is (as the court below put it) "either fully reviewable on completion of the trial or *not* fully reviewable *until* the completion of the trial" (Pet. App. 32a).[29]

The constitutional rights invoked in *Flanagan* do not exist in the civil context. The rights invoked here derive from a different source. Here the right of the clients to be represented by the counsel they have retained and the right of the attorneys not to have their clients taken from them are defined and limited by the local rules of the district court, the local disciplinary rules, and the inherent power of courts to supervise civil cases. Those rights exist without regard to whether their violation would affect the outcome of the case. A showing of prejudice to the case is not an element of establishing a violation of these rights, and a violation is not effectively reviewable after trial. Thus, the *Flanagan* dichotomy does not exist here,[30] and all the criteria for a "collateral order" are satisfied.

---

[29] Implicit in the *Flanagan* Court's formulation is the possibility that if the constitutional rights invoked there require a showing of prejudice at trial—and thus do not satisfy the second criterion for a "collateral order"—there may be no effective post-judgment appeal of the claim. The possibility that there is neither pre-judgment nor effective post-judgment review of an order inheres in the three-criterion test for a "collateral order", for "effectively unreviewable" is only one of the criteria that must be met. The ruling in *Flanagan* thus does not imply that a post-judgment appeal from a disqualification order, where the appellant must show prejudice, would enable effective review of that order.

[30] The analysis in *Flanagan* of the three criteria for appealability was entirely in the context of the constitutional rights invoked there. That case did not involve a claim that a disqualification order was improper for non-constitutional reasons. But the rule announced by the Court was broader than the particular claims

II. THE REVERSAL OF THE DISQUALIFICATION ORDER WAS PROPER.

Orderly treatment of petitioner's challenges to the merits of the decision below requires that these challenges be placed in the proper framework. Contrary to the premise of petitioner's first question presented, the district court did not find either Allis or Butler "guilty" of any violation of ethical standards. The district court believed that because Allis and Butler were appearing *pro hac vice*, it could revoke their appearances without any finding that they had committed a defined act of wrongdoing. The court of appeals rejected this legal standard, holding that, under the applicable local rules, "*pro hac vice* counsel, once admitted, are [not] subject to disqualification more readily than regularly admitted counsel" (Pet. App. 34a-35a). Petitioner has not challenged that ruling in this Court.

In the court below, *petitioner* requested that the court of appeals decide what the district court had not: whether Allis and Butler could be disqualified under the standards applicable to regularly admitted attorneys (*id.* at 35a). The court below undertook that inquiry and determined that under the proper standards neither Allis nor Butler could be disqualified. In reaching that determination, the court did not hold, as petitioner's brief suggests, that attorney misconduct cannot be a basis for disqualification. Rather, the court ruled that a trial court has power to disqualify an attorney for "misconduct" only when (a) the attorney has committed a violation of legal or ethical norms and (b) the violation is of a nature "likely to infect future proceedings" (*id.* at 36a-38a). Applying this standard, the court determined that Allis could not be disqualified, for he had committed no misconduct, and that Butler could not be disqualified because even if his communication to Mintz had violated an ethical standard—and the court did *not* decide that question—the record did not permit a finding that that conduct was "likely to infect future proceedings" (*id.* at 56a, 71a).

In making those determinations, the court stated the standard of review as follows:

> The district court has wide discretion in the exercise of its duty to supervise members of the bar appearing before it. See *Groper v. Taff*, 717 F.2d at 1418. In reviewing the court's decision, we are bound to accept the court's findings on disputed issues of fact unless they are clearly erroneous. The district court's conclusions of law, including its interpretation of the Code of Professional Responsibility, and its application of the law to the facts are of course subject to appellate review for legal error. [*Id.* at 33a-34a].[21]

---

analyzed: "a District Court's pretrial disqualification of defense counsel in a criminal prosecution is not immediately appealable under 28 U.S.C. § 1291" (104 S.Ct .at 1052). By its terms, this rule would preclude pretrial appeal of a disqualification order in a criminal case that is attacked on non-constitutional grounds. But that result could not be justified by *Flanagan*'s analysis of the appealability of a constitutional claim—which either would be effectively reviewable after trial or would require a showing of prejudice at trial. The non-constitutional grounds in a criminal case, as here, have neither of these attributes. Therefore, if *Flanagan* intended a rule that would encompass such grounds, that outcome would have to be a function of the other factor that was heavily relied on in *Flanagan*: the "compelling interest" in the criminal justice system against pretrial appeals. See *supra* at 33.

[21] Thus, contrary to petitioner's contention (Pet. Br. at 31-34), the court did not foreswear the abuse of discretion standard. The court simply recognized that the trial court's discretion is not boundless. A trial court does not have discretion to disqualify an attorney for any reason whatsoever. Its discretion begins only when there exist facts that, under the controlling legal standard, establish that disqualification is a course of action available to the district court in the exercise of its discretion. The purport of the court's opinion is simply that when the power of a trial court to exercise discretion depends on a finding of fact or a conclusion of law, then the former is subject to review under the clearly erroneous standard and the latter is subject to review for legal error. See, *e.g.*, *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975).

That result is hardly surprising. As this Court stated in *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982): "Rule 52(a)

The court was meticulous in following the "clearly erroneous" rule throughout its opinion; the court accepted for purposes of its analysis all of the district court's findings of fact, and cited additional facts only when the evidence was undisputed. See, *e.g.*, *id.* at 5a n.6; 6a nn.9, 11; 14a n.27; 17a n.34; 42a-44a; 71a.

A. The Ruling Respecting Allis' Disqualification

In ruling that Allis' conduct was not improper, the Court of Appeals did not disagree with the district court's *factual* findings. The material facts respecting Allis' "preparation and procurement" of a statement from his secretary are undisputed in the record before the Court. See 1-14, *supra*. Rather, the Court of Appeals premised its decision on its interpretation of the nature of the legal duties imposed by the Code of Professional Responsibility.

As discussed *supra*, at 20-21, the basis of the district court's dissatisfaction with Allis was its view that, under the circumstances he encountered, Allis was obliged to abandon "pursuit of the interests of his clients" in favor of "an investigation where the objective is to ascertain the truth and thereby to assist in preventing any acts of fraud upon the court" (*id.* at 77a). This is the "true investigation" that the district court found Allis had "attempt[ed] to thwart" by "pursuit of protecting the interests of his clients" (*id.*). But as the court of appeals explained, Allis had no obligation in the circum-

---

broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from [that standard of review]." And it is elementary that the interpretation of a rule, for example a Disciplinary Rule of the Code of Professional Responsibility, should be reviewed on the basis of legal error—*i.e.*, whether or not the interpretation is correct. A trial court is not given discretion to interpret such rules; the rules have a meaning, and the trial court's conclusion as to that meaning is either correct or incorrect. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 695-707 (1982), and *National Hockey League v. Metropolitan Hockey Club., Inc.*, 427 U.S. 639 (1976), which are cited by petitioner, are wholly consistent with this analysis.

stances he encountered to abandon "pursuit of the interests of his clients" or to assist the court in an "investigation" of his clients' *bona fides*. On the contrary, because he did not have an "objective and informed recognition" that his clients' claim was fraudulent, the Disciplinary Rules required only that he pursue his clients' interests "zealously" (*supra*, at 23-24). And, the court concluded, as petitioner virtually conceded below, that Allis' securing his secretary's statement was entirely consistent with the Disciplinary Rules (*supra*, at 24-25).[32]

The only factual predicate for that legal conclusion is undisputed: at the time Allis "prepar[ed] and procur[ed]" the statement, he did not have an "objective and informed recognition," as defined by the Disciplinary Rules, that his clients' claim was fraudulent. Allis believed, and had more than a reasonable basis to believe, that the Kollers' claim was well-founded. Indeed, Janowski was giving Allis reason to believe that petitioner—and possibly Janowski herself—were engaged in misconduct, not that his clients were so engaged.

The reversal of Allis' disqualification thus was predicated entirely upon two legal rulings, neither of which is challenged in this Court: (1) *pro hac vice* attorneys are not subject to disqualification on grounds not applicable to regularly admitted attorneys, and (2) absent "objective and informed recognition" that a client's claims are fraudulent, an attorney is entitled, indeed obliged, to pursue those claims zealously.

B. The Ruling Respecting Butler's Disqualification

Butler was disqualified for providing information to the press germane to an issue of great public importance that transcended the Kollers' lawsuit. Bendectin was on the market. Pregnant women were ingesting the drug.

---

[32] In the court below, "[i]n oral argument defense counsel conceded that, given what Allis knew on December 27, it was proper, and perhaps even required by his duty to the Kollers, for him to visit Janowski and probably to take some kind of a statement" (Pet. App. 44a).

Butler believed the drug was dangerous. He sought to get the FDA to act. He furnished both the FDA and Mintz information that supported his position. No order of the district court purported to prohibit him from doing so: the information transmitted by Butler to Mintz was not under seal; nor was it covered by any order restricting communications to the press. See *supra*, at 17-18.

The district court did not find Butler to have violated any ethical norm, and did not even mention, much less invoke, the Disciplinary Rule asserted by petitioner on appeal as justification for the disqualification. Nor did the court find that the *Post* article—which gave a balanced presentation of the debate over whether Bendectin is dangerous (see *supra* at 16)—would in fact prejudice the trial. And the court did not find that Butler had demonstrated an unwillingness to conform to orders of the court or ethical standards such that the integrity of the trial would be jeopardized.

The district court based its action solely on the finding that Butler's communication to Mintz was a "flagrant circumvention" of the court's *evidentiary* orders, and that "Butler's refusal of the Court's suggestion that he explain his actions during the hearings merely buttress[es] the Court's conclusion that his release of the DER's to the media was calculated to prejudice the defendant's case and circumvent the Court's prior rulings" (Pet. App. 77a-78a). The court of appeals questioned this finding:

> The court heard no live testimony on this issue; in particular it heard no testimony contradicting a plausible explanation contained in Butler's affidavit for the timing of the release—that he had not received the parents' authorizations to release the information until January. We do not believe that the court could reasonably conclude from Butler's failure to testify voluntarily that he was lying in his affidavits as to his motivation. In light of this explanation, together with Butler's amply demonstrated concern over the safety of Bendectin, the peculiar timing of Butler's release of information does not provide unambiguous support for the court's finding of bad intent. [*Id.* at 51a].

But the court of appeals found it unnecessary to decide whether the district court's finding was clearly erroneous. And, the court found it unnecessary to decide whether Butler's conduct constituted a violation of the Disciplinary Rule relating to press communications. Rather, applying the second part of its legal test for disqualification, the court determined that the record would not support a finding that Butler's conduct was "likely to infect future proceedings" (Pet. App. 54a, 56a, 71a), where: (i) Butler's conduct was not "anywhere near equivalent to a violation of a court order" (*id.* at 52a); (ii) Butler's conduct was at least arguably not a violation of any ethical standard (*id.* at 53a, 54a); (iii) Butler's conduct was at least arguably protected by the First Amendment (*id.* at 52a, 54a); (iv) the *Post* article was balanced and was published prior to the assignment of jurors to the case (*id.* at 55a); and (v) there was no basis for finding that "voir dire, a process designed in part to protect against prejudicial publicity, would be inadequate to discover and remove jurors influenced by the Mintz article" (*id.*).[33]

We show below: (1) that the standard for disqualification applied by the court below is appropriate; (2) that, in any event, Butler's communication to Mintz did not violate Canon 20; and (3) that Butler's expression was protected by the First Amendment.

---

[33] Even if, *arguendo*, Butler's communication to Mintz violated Canon 20 of the ABA Canons of Professional Ethics, which has been adopted as part of the D.C. Code of Professional Responsibility, DR 7-107(H), the first three factors listed in text preclude any finding that Butler's behavior manifested an unwillingness to "'stay in bounds' in the future [or] that subsequent disciplinary proceedings would be inadequate to protect the integrity of the judicial process" (Pet. App. 56a, distinguishing *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968)).

1. *The standard for disqualification.* As discussed *supra*, at 22-23, the court below recognized that certain attorney conduct by its nature may disturb "the balance of presentations" in the underlying trial and warrant disqualification—*e.g.*, where an attorney has a conflict of interest, or has previously represented the opposing party, or must testify as a fact witness at trial. Pet. App. 36a-38a. The court determined that aside from such situations, "[e]xcept in cases of truly egregious misconduct likely to infect future proceedings, other means less prejudicial to the client's interest than disqualifying the counsel of her choice are ordinarily available to deal with ethical improprieties by counsel" (*id.* at 38a).[34] Thus, in such cases, to justify disqualification of an attorney a court must find not only that the attorney engaged in misconduct but also that the misconduct is "likely to infect future proceedings."

Contrary to petitioner's argument, this standard is not a departure from the long-standing recognition that trial courts must be adequately empowered to protect the integrity of the trial process. Rather, the standard evolved in a series of Second Circuit decisions precisely as a means, on the one hand, to preserve that traditional and necessary power, and, on the other, to protect the integrity of the trial process against a different, and growing, evil: the tactical abuse of motions to disqualify opposing counsel as a means to delay and disrupt civil litigation, to probe into the confidential communications and strategies of an adversary, and to deprive a party of the counsel of its choice.[35] See *supra* at 33-35. The trial court's interest in the integrity of the proceedings before it is the very focus of the inquiry. If an attorney's con-

[34] The court listed formal reprimand, contempt citation, and referral to disciplinary bodies of the bar as examples of such "other means" (Pet. App. 38a-39a, n.49).

[35] See, *e.g.*, *W.T. Grant Co. v. Haines*, 531 F.2d 671, 676-78 (2d Cir. 1976); *Board of Education v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *Armstrong v. McAlpin*, 625 F.2d at 444-46.

duct is *not* "likely to infect future proceedings," then the integrity of those proceedings is not threatened. In that circumstance, there is no reason to divert the trial court's resources to a "wasteful and time-consuming" inquiry into the propriety of the attorney's conduct rather than to employ the disciplinary machinery of the bar for that purpose (see *Nyquist*, 590 F.2d at 1247-48 (Mansfield, J., concurring)). Nor is there reason in that situation to deprive a client of the lawyer of his choice. And, of course, if an attorney's misconduct *is* "likely to infect future proceedings," the standard empowers the trial court to order disqualification. This standard is proper: it is well-calibrated to guard the judicial process against the evils both of attorney misconduct and abusive motions to disqualify, while at the same time giving due protection to the interest of a party in having the lawyer of his choice.[36]

2. If the standard just discussed were not upheld, it would become necessary to determine whether Butler's conduct violated Canon 20, an issue the court below did not decide (Pet. App. 71a). For, at a minimum, disqualification of an attorney could not be permitted without a determination that the attorney has violated some legal or ethical norm. Canon 20 provides as follows:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due

[36] The Ninth Circuit, in *American Protection Ins. v. MGM Grand Hotel*, slip op. at 9-10, has recently joined the Second Circuit and the court below in adopting this standard. This standard is consistent with this Court's "adher[ence] to the principle that only '[t]he least possible power adequate to the end proposed' should be used in contempt cases." *United States v. Wilson*, 421 U.S. 309, 319 (1975). The Court has approved postponing punishment of attorneys for contempt until after trial, so as not to deprive a party of his counsel or otherwise to prejudice the party's case on the merits; the Court has found such restraint fully consistent with "the integrity and efficiency of the trial process." *Sacher v. United States*, 343 U.S. 1, 10 (1952); see *Taylor v. Hayes*, 418 U.S. 488, 497-98 (1974).

> administration of justice. Generally, they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement. [Pet. App. 95a-96a].

On its face, the rule has no application here. It applies to "newspaper discussion *of* pending litigation"—or *"as to* pending or anticipated litigation" (emphasis added). The last sentence of the rule corroborates that limited scope. Thus, the rule does not by its terms purport to bar a lawyer from speaking out on an issue of public importance that transcends any particular trial simply because that lawyer is involved in pending litigation that relates to the issue.

Moreover, as the court below recognized (Pet. App. 54a, footnote omitted):

> The Legal Ethics Committee of the District of Columbia Bar has emphasized with respect to [Canon 20] that it "would hesitate to interpret the Code of Professional Responsibility or the Canons of Professional Ethics in such a way as to thwart the communication of accurate factual information regarding legal proceedings to the press in the absence of a *substantial threat to the due administration of justice.*" Formal Op. 8 (1975) (emphasis added).

The facts here—that "the resulting article was far from inflammatory" and indeed was "balanced" in nature, and that any conceivable prejudice from the article could be handled by ordinary jury *voir dire*—leave no room for finding "a substantial threat to the due administration of justice" (Pet. App. 54a-55a).

3. If Canon 20 were interpreted to prohibit Butler's expression, the question would then arise whether, so construed, Canon 20 is consistent with the First Amendment. There can be no doubt that there is a powerful

public interest in communications of the type Butler made in this case. Communications regarding the dangers of a drug, and urging the FDA to remove that drug from the market, relate to issues of broader public importance than simply the conduct or outcome of a particular trial. Yet, because Butler was an attorney with an imminent trial in a Bendectin case, petitioner contends that Butler forfeited the right to participate in the public debate on the dangers of Bendectin, and to bring to light in that debate all the information he believed supported his position.

This Court has never considered the restrictions that pending civil litigation may impose on an attorney's First Amendment freedom to speak on issues of broad public concern related to, but transcending, a lawsuit. The lower courts that have addressed this issue have uniformly held that such expression may not constitutionally be restricted by general disciplinary rules. In *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1974), *cert. denied*, 427 U.S. 912 (1976), for example, the court explained:

> Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not be kept from the public. Yet it is normally only the attorney who will have the knowledge or realize its significance. . . . The lawyer representing the . . . plaintiffs may be the only articulate voice for that side of the case. Therefore, we should be extremely skeptical about any rule that silences that voice.
>
> • • • •
>
> For instance, in an airplane crash case an attorney who discovered that unsafe flight procedures were in effect and were being condoned by government regulatory agencies could not impart this vital information to the public. . . . The need for informed and public discussion of this type of issue far outweighs any possible benefit that might accrue in terms of maintaining the laboratory conditions of a civil trial.

Accord, e.g., Hirshkop v. Snead, 594 F.2d 356, 373 (4th Cir. 1979) (*en banc*); *Ruggieri v. Johns-Manville Prod-u-'s Corp.*, 503 F. Supp. 1036 (D.R.I. 1980); *cf. CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) (vacating gag order in civil case).

There may be instances when such speech would pose a serious threat to the fair administration of justice. *Cf. Nebraska Press Association v. Stuart*, 427 U.S. 539, 564 (1976); *id.* at 601 n.27 (Brennan, J., concurring); *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966).[37] Such a situation would require a court to reconcile two competing and fundamental interests, and would most appropriately be addressed by a court order expressly defining the limits on attorney speech that are warranted in the particular case. But, there is no occasion to resolve that balance here. The district court did not find a threat to the administration of justice from Butler's speech, and, as the court of appeals explained, no such finding could be made on the facts of this case. Pet. App. 54a-55a; see *supra* at 43 & n.33.[38] Without a showing that Butler's speech, or the single balanced article that resulted, actually threatened to impair a fair trial,

[37] In *Nebraska Press* and *Sheppard*, the Court suggested possible restrictions on attorney speech in the context of criminal cases, where the guarantees of the Fifth and Sixth Amendments apply. And even in those cases, the Court did not suggest that a blanket restriction on speech by trial participants would be appropriate in all circumstances. *Nebraska Press*, 427 U.S. at 554 ("pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial"). *Cf. Hirshkop v. Snead*, 594 F.2d at 373 (distinguishing restrictions on attorney speech in civil and criminal cases); *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 257-58 (same).

[38] The court of appeals was fully entitled to assess the probable impact of Butler's speech. Indeed, the court had "an obligation to 'make an independent examination of the whole record' in order to make sure 'that the judgment [did] not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union*, —— U.S. ——, 104 S. Ct. 1949, 1958 (1984). *Accord, e.g., Wood v. Georgia*, 370 U.S. 375, 386-88 (1962); *Pennekamp v. Florida*, 328 U.S. 331, 335, 346-50 (1946).

Butler's communication on the dangers of Bendectin cannot, consistent with the First Amendment, support the sanction of disqualification. *Wood v. Georgia*, 370 U.S. at 386-89.[39]

[39] As the court of appeals noted, the trial court based its disqualification of Butler solely on its "finding that Butler's intent was to 'prejudice the defendant's case' and circumvent the court's evidentiary rulings." Pet. App. 51a. While that finding of intent is itself open to serious question, *id.*, even the trial court did not find that that was Butler's *only* motive. Butler's avowed motivation was his belief, based on over two years of research, that Bendectin was a dangerous drug that should be taken off the market without further delay (see *supra* at 18-19); the district court did not find that Butler lacked that motivation. See Pet. App. 19a, 51a, 78a.

In any event, the motivation for Butler's speech cannot constitute a proper basis for his disqualification. We are unaware of any case in which the Court has held that a speaker's *motive* may justify restriction of his speech even though the content of his speech contributes to debate on an issue of significant public concern. Indeed, if such an inquiry were permitted, it would chill protected speech. As the Court has often recognized, "[t]he threat of sanctions may deter [the] exercise of [First Amendment freedoms] almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963). The threat of sanctions would be particularly real where, as here, the sanctions follow from a standardless, *post hoc* inquiry into the speaker's motive. The nature of the evidence upon which a finding of bad intent was made here dramatizes the point: a lawyer motivated solely by innocent purpose would inevitably generate the same record as exists here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JACOB A. STEIN
ROBERT F. MUSE
STEIN, MITCHELL
& MEZINES
1800 M St., N.W.
Washington, D.C. 20036
(202) 737-7777

ROBERT M. WEINBERG *
MICHAEL H. GOTTESMAN
PETER O. SHINEVAR
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

APPENDIX

APPENDIX

DISTRICT OF COLUMBIA
CODE OF PROFESSIONAL RESPONSIBILITY

DR 7-101. Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR 7-102. Representing a Client Within the Bounds of the Law.

* * * *

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.